

Testimony of Rochelle A. Reback
Before the Ad Hoc Committee to Review the Criminal Justice Act Program
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Introduction

My name is Rochelle A. Reback. I am a recently retired lawyer from Tampa in the Middle District of Florida. I began my legal career in criminal defense while still in law school, clerking in a well-regarded private practice, apprenticed to one of the most accomplished criminal defense lawyers in New York State. After graduation and upon my admission to the New York Bar I continued to practice criminal defense with that lawyer in New York, until my move to Tampa in November, 1985. I was admitted to the Florida Bar in early 1986 and spent 3 years in private practice under the supervision of another well-known criminal defense lawyer. In both of those “second-chair” positions, over a period of 7-8 years, I represented targets of investigation and criminal defendants in State and Federal Court with the best defense resources well-funded clients’ money could buy. That is the experience I brought to the CJA Panel in the Tampa Division of the Middle District of Florida.

In January 1989 I began my own law firm, concentrating my practice in State and Federal criminal defense and civil rights cases. I maintained an AV-rating from Martindale-Hubbell for ~15 years until my retirement. I was named a Florida “Super-Lawyer” and I was included in the “Best Lawyers of America” in both white-collar and non-white collar criminal defense. For the last 10 or 12 years of my practice, almost all of my cases were in Federal court. But when I applied to serve on the Tampa CJA panel in 1989, I was an unknown quantity to the court.

I simply visited one of the U.S. Magistrates in the Tampa Division of the MDFL and asked to be placed on the CJA Panel. Since I was a member in good standing of the Florida Bar and the Bar of the MDFL, I was immediately put on the district’s panel and eligible for federal felony criminal case appointments. No real inquiries were made as to my experience in criminal defense or my qualifications to represent Federal defendants, perhaps because my former employer was known to the court, but more likely because, *even to this day*, there is no rigorous admission process nor any real professional evaluation of the lawyers who apply to serve on the CJA panel in the Tampa Division of the MDFL. If you are a Bar member in good standing, with 2 years of any law practice, who has attended one educational seminar on the U.S. Sentencing Guidelines, you are presumed qualified to represent any indigent federal felony defendant and you are added to the panel. These extraordinarily low standards for joining

and remaining on the Tampa CJA Panel have not changed much since 1989. Despite the adoption of a Model CJA Plan for the District which contemplates some modestly more strict admissions standards, a more formalized administration structure, a “Mentor panel” and a 3 year term for panel attorneys, that Model Plan is simply not followed in the Tampa Division and in practice there is in fact no consistent structure to any elements of the CJA panel in Tampa.

I was very active on the CJA panel in Tampa for some 23 years until I had to close my law practice and recently retire due to a medical disability. I am privileged to be asked to relate my views regarding the CJA program to this Committee because of my extensive experience and because, unlike those attorneys still active on the Tampa panel, I no longer take cases, so I am able to speak frankly and directly without any fear of retribution or sanction by the Judges of the MDFL.

Panel Administration

The Tampa Division of the MDFL is rather unique in that the Article III Judges maintain complete and total control over absolutely all aspects of the CJA program. There is no independent “CJA Committee” or “CJA Administrator” mediating between the lawyers and the Judges or evaluating who may serve on the panel or which attorneys are best qualified to take which cases. The Federal Public Defender also has little input on the administration of the Tampa CJA program, other than to provide a required yearly Continuing Legal Education program to the panel and to select the District CJA Panel Representative. Indeed, there is little consistent “program” at all in the administration of the CJA in Tampa as each District Judge and Magistrate Judge makes his or her own rules in all areas of the CJA in which they have any discretion.

Both admission to the CJA panel and appointments to cases in the Tampa Division are very improvisatory. In my observation, there are few real minimum qualifications for admission other than (1) being in good standing with the Bar and Court, (2) maintaining a valid PACER account; and as of several years ago (3) certification that the attorney has attended *either* one federal criminal practice seminar presented by the Federal Public Defender’s Office *OR* one seminar on the US Sentencing Guidelines presented by the Federal Bar Association for each year one wishes to serve on the panel; though even that minimal CLE requirement may be waived at the discretion of the judges. Once on the panel attorneys tend to remain on the panel, though if they displease the judges for any reason, they are simply no longer given any CJA appointments. This generally happens without any notice to counsel. There is no

formal removal process, no due process nor any appeal, so there is no reasonable expectation of being rehabilitated or ever being returned to active CJA duty. A lawyer's name will simply and quietly disappear from the panel list at the next annual renewal period at the request of any Judge.

The CJA Panel in Tampa has always been enormous and much larger than necessary to fairly serve the number of indigent defendants in the Tampa Division. This is especially true since the economic recession of 2008 and an influx of State civil court practitioners seeking more paying cases joined the panel. Though it fluctuates, the Tampa Division panel is now and has been well over some 125 lawyers, ranging in experience from absolutely no federal criminal defense experience at all, to those with extensive private federal criminal court practices. Many of the experienced lawyers are on the panel primarily as a public service to the court, to keep their legal and trial skills sharp and to maintain relationships with the local federal judges. Most of the inexperienced lawyers are simply looking for any paying work.

It is different in the other smaller Divisions of the MDFL where their Judges delegate more panel administration to the Federal Defender. In the Orlando, Jacksonville and Fort Myers Divisions CJA panel enrollments have been kept down to a number just adequate to serve the anticipated needs of indigent defendants and no more. Though their numbers also fluctuate, Orlando's panel is usually ~45 lawyers while Jacksonville and Fort Myers are both much smaller. Unlike Tampa, these CJA lawyers are assigned cases from a weekly rotation system initiated by the Federal Defender to try to insure fairness in the allocation of appointments. Until recently, because criminal case filings are down, each lawyer in rotation in these court divisions could reasonably expect to receive at least 3 to 4 CJA appointments per year, according to former CJA Panel representatives in the district. This expectation incentivized the panel to maintain higher proficiency in federal criminal defense and current court procedure.

Over my 23 years on the Tampa panel I know that the District-wide CJA Panel Representatives have all urged each Chief Judge to consider restructuring the Tampa panel, ideally to convince the Tampa Judges to relinquish some control over it to a CJA committee or to an independent CJA administrator; or at a bare minimum, to remove many inexperienced lawyers and those unfamiliar with federal criminal defense practice from the bloated panel, so that the panel would be a smaller, more professional cohort of highly competent CJA lawyers, all very proficient in federal criminal defense. For many years the court has also been asked to institute more rigorous qualifications, training and experience requirements for admission to the panel and before lawyers are permitted to represent clients

in life felonies and more complex cases. These requests have always been rebuffed, with the judges content to rely on their own contacts and experience to appoint particular lawyers to particular cases. This means that despite the consistently huge list of ostensibly qualified and available CJA attorneys in Tampa, relatively few actually get appointed to many cases. In addition to fostering an appearance of cronyism, the size of the panel and the untethered assignment authority of the judges make it difficult to recruit new, competent lawyers to the panel, and discourages some newer lawyers already on the panel from staying current on federal practice skills and legal issues while they wait...and wait... for a case to come to them.

For reasons that have never been publicly articulated, the Tampa Division district judges and some Tampa Magistrate Judges are opposed to making any significant changes to the CJA panel, even when gently counseled to do so by other Magistrate Judges who recognize the problems associated with the current system. Most Tampa Judges simply prefer to retain full control over which lawyers get which cases. Most judges have not been willing to constrain any aspect of their individual discretion to reward or punish panel lawyers, frankly, at the expense of some indigent defendants' legal representation. Their disavowal of any independent structure for the panel is the source of many problems.

Other than the Model CJA Plan last re-authorized in 2011, which is largely ignored in Tampa, the court has not promulgated any consistent structure or guidance governing all Judges' conduct with respect to the CJA panel on issues such as case assignments, case budgeting, the "reasonableness" of claimed attorney time and the necessity of paying for extraordinary defense resources, payment for remote jail travel time, payment/ cutting vouchers, removal from the panel, or anything else. Instead, in Tampa, the administration of the CJA panel remains a judicial free-for-all, totally subject to the predilections and preferences of individual judges and generally lacking consistency, transparency, attorney independence and fairness.

CJA Panel Appointments

Tampa panel attorneys are generally appointed to cases by the Magistrate Judges, or often by their courtroom deputies to whom the task of selecting a CJA lawyer is delegated in routine cases. The appointment process is consistent only in its inconsistency. In routine cases, some Tampa Magistrates' chambers appoint by simply calling

down the list of panel attorneys supplied by the Clerk's office until they find one who is immediately available to take the next case and come to court, regardless of the skill of the lawyer or the nature of the case. If any CJA lawyer declines too many of these "*instanter*" calls for any reason, that lawyer is usually crossed off the list by that chambers and won't be called again. Most Magistrates' chambers will also "cherry pick"— appointing certain lawyers for particular cases and, where a case is already assigned to a District Judge, the Magistrate Judges' CJA appointments are greatly influenced by the preferences of that District Judge, either for or against certain panel lawyers.

In other situations, the appointments are more influenced by financial factors. For example, Spanish speaking lawyers are more often appointed to Spanish speaking defendants than lawyers who do not speak Spanish. Because Tampa has long been the prosecution headquarters of Operation Panama Express ("PANEX"), a multi-agency Organized Crime Drug Trafficking Strike Force focusing on interdicting cocaine shipments en route from South America, we have a steady stream of Spanish-speaking indigent defendants in multi-defendant maritime drug smuggling cases for which Spanish speaking CJA lawyers are always given preference because they will spend less CJA money on out-of-court interpreters. There is also some utility and efficiency in appointing a regular cast of lawyers to similar cases with similarly-situated defendants. It is easier for Judges to recognize over-billing or under-billing by panel lawyers in the PANEX cases, and the defendants may get better representation by experienced counsel very familiar with such cases. Sometimes more experienced lawyers are favored with appointments to the more complex, white collar fraud cases by those Magistrates and Judges who appreciate a rigorous, in-depth, zealous defense in a lengthy, complex case. Ironically, other Magistrates and Judges will shun appointing those same highly experienced lawyers to complex fraud cases precisely because those lawyers will always present a rigorous, resource intensive, in-depth defense that inevitably takes more court time, lawyer time and more money to develop.

Some panel lawyers are also blacklisted by some chambers for real or imagined personal slights to a Magistrate, a Judge or their chambers' staff. Some panel lawyers are especially favored by certain chambers and always receive more "good" appointments than their fair share. Other panel lawyers on the cluttered list receive only one, or maybe two, small cases a year. They are understandably reluctant to invest more time and money into CLE to gain or maintain proficiency in federal criminal practice, while other panel lawyers receive so many appointments that

CJA cases constitute the bulk of their practice.

Vouchers, Resources, Payments and the Independence of the CJA Panel

The MDFL has one dedicated Deputy Clerk for CJA who first reviews payment vouchers and expense receipts for completeness before submitting them to the Judge for a “reasonableness” review. Generally, amounts billed under the CJA cap are approved if deemed reasonable in the context of the case. Amounts over the CJA cap always require a Motion and Memorandum justifying the compensation sought, along with the voucher. Since the MDFL has gone to e-vouchers, much more detailed information is required on the voucher to justify fees claimed.

The greater detail now required by e-vouchers has both good and bad effects. First, it should be noted that lawyers are not paid for any time related to billing. Some panel lawyers with busier private practices find the enhanced CJA billing detail now required to be too time-consuming because they can no longer delegate voucher preparation to their office staff. Some find the billing detail required to be too intrusive, particularly in cases approved for “interim payments,” as they believe it may compromise the work product privilege and invade the independence of the lawyer to develop a defense for the client while worrying whether the Judge will approve payment for the exploration of that defense. On the other hand, the greater billing detail now required has been very helpful in reining in excessive claims by newer or less scrupulous panel lawyers by making it easier for Judges to evaluate vouchers for excessive billing.

Tampa lawyers’ vouchers are still sometimes cut by some Judges without good cause and without any recourse or formal review process. Because we lack an independent administrator or CJA committee to review claims of excessive billing, this task often falls informally to the CJA Panel Representative to whom the aggrieved lawyer will complain. The representative’s additional uncompensated task of voucher review, like that of the illusive “CJA Mentor” called for in the Model Plan, is one that few lawyers wish to take on in this capricious, unmediated system, where Judges and lawyers are at odds over money and fees.

In my view, the even more insidious issue is the lack of a fair process for obtaining defense resources which would protect the independence of CJA lawyers in their preparation of a defense. Most panel lawyers are small firm or solo practitioners, so they must rely on the court to fund the extraordinary expenses of their case. The time they must spend to file motions and memoranda and attend hearings to justify obtaining necessary defense resources over \$800

on investigators, experts, translators, forensic accountants, paralegals, document management, technical aid and the like, is often excessive and intrusive. Some Judges and Magistrates are so intimately involved in micro-managing the allocation of defense resources to “save money” that they chill the Sixth Amendment rights of indigent defendants to independent and conflict-free CJA representation.

For example, in Tampa, some Judges have insisted that lawyers with conflicting defenses share one set of discovery materials in multi-defendant cases, that lawyers determine whether their clients will plead guilty before engaging an investigator or expert or reviewing substantial discovery materials, some have suggested that CJA lawyers just rely on the work product of the Public Defender in multi-defendant cases, rather than engage their own experts, investigators or translators. In a recent federal capital murder case, until a Defender Services Resource Counsel intervened, a Magistrate Judge was set to order the defense to hire and rely on a “cheaper” paralegal to review a large amount of evidence relevant to the murder defense, refusing to allow the CJA lawyer herself to bill her time for personally reviewing that evidence.

All of this sort of judicial penny-pinching micro-management of the CJA lawyers’ work product has the effect of constraining some panel attorneys from actually providing a zealous defense to their clients. It intimidates some lawyers from even seeking adequate time and resources for their clients’ defense, and it chills even the most seasoned lawyers’ creative advocacy amid worries they will not be appointed to any new cases, or their vouchers will be cut due to antagonizing Judges by insisting on adequate resources to develop an independent and aggressive defense. It is not uncommon for some Tampa Judges to view a full throttle defense by CJA counsel as obstructionist, inconvenient and annoying. Since the Judges retain *de facto* unilateral power to cut fees and remove lawyers from the panel, few CJA lawyers can withstand the opprobrium of those Judges, and it shows in the quality of their work for their clients.

In sum, in my experience, most of the problems with the Tampa CJA “Program” or lack thereof, are structural. They could largely be resolved by requiring a District or Division-wide independent CJA Panel Administration Committee, consisting of the Federal Public Defender or her delegate, and a number of experienced federal defense practitioners, appointed by the Court to serve staggered, limited terms to intervene and mediate between Judges and the CJA panel. The CJA Committee should have the sole authority to (1) evaluate, admit or deny all lawyers’ applications to serve as CJA counsel and to remove panel members for cause, and (2) to assign panel

lawyers to serve on one of three tiered panels—misdemeanors and general felonies, complex cases and appeals/habeas cases-- based on the lawyers’ experience, reputation and professional goals, and the lawyers’ requests for tier placement should also be considered , and (3) to maintain each of the 3 panels at a smaller, reasonable size to serve the projected needs of the Division’s indigent defendants, while insuring that case assignments are allocated fairly, so that all panel attorneys are incentivized to increase and maintain their proficiency in federal criminal court. Judges should relinquish their sole discretion over the admission and removal of attorneys on these panels and, for the most part, they should all commit to a case assignment system that operates more fairly and transparently, without the black-listing or favoritism that their unilateral authority allows.

This independent CJA Committee could also be responsible for making recommendations to the Judges on the “reasonableness” of attorney voucher claims, and could possibly act as an additional source of counsel and advice for the court and the lawyer in relation to defense resource expenditures.

Thank you for the opportunity to present my views to this Committee on behalf of the CJA panel lawyers of Tampa and thank you for holding this public hearing. I’m very grateful for your efforts to conduct a thorough review of the operation of the CJA across the federal districts. I’m hopeful that the quality of indigent defense will benefit from this inquiry and the satisfaction and proficiency of CJA panel lawyers will improve as a result.

Rochelle A. Reback
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